The relative conditions for the valid conclusion of a contract, under the New Civil Code

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Abstract: The legal regime of contracts in the new Civil Code enjoys a more judicious regulation compared to the previous regulation, because of the importance of these legal acts for the social life. This current importance is given by the fact that the society is in constant evolution and both the individual and the collective interests need greater protection. We mentioned the collective and the individual interests because contracts often illustrate them in different ways.

Keywords: contract; condition; offer, acceptance; form; validity.

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Preliminary considerations

It may be noticed that the new Civil Code (hereinafter NCC) has made important clarifications regarding contracts, primarily in terms of their classification [1]. Also, compared to the old provisions for signing contracts, the civil legislator considered particularly useful to generously devote it more texts [2]. This is because the conclusion of the contract represents the most important step in establishing a legal obligation relationship, upon the fulfillment of the agreement between the parties on the terms stated within the contract.

In order to attain this agreement, the parties should have the necessary capacity, but, equally, they should comply with the principle of good faith in negotiations. The initiation or discontinuation of their negotiations contrary to good faith shall be penalized by obliging the guilty party to pay for damages. Equally, the parties are obliged to maintain confidentiality and not use in their own interests the confidential information which they found out during negotiations, even if they have not resulted in the conclusion of the contract.

Also, the valid conclusion of a contract, under art. 1179 of the NCC, requires the fulfillment of four essential conditions: a. the capacity of the parties to contract; b. the consent of the parties; c. a specific and lawful object; d. a legal and moral cause.

Exceptionally, where the law requires it, and under its penalty, a contract should be drawn up in compliance with the conditions of form (formal contracts); thus, another prerequisite is added: the form.

Along with these essential conditions for the validity of a contract, we identify a series of civil provisions concerning some relative conditions required for the valid conclusion of the contract, namely: time and place of conclusion of the contract; the offer to contract; accepting the conclusion of the
contract; form and content of the contract. Additionally, it is useful to note that the relevant provisions for the conclusion of contracts are provided by art. 1178-1245 of the NCC.

As we will show, if these conditions necessary to the validation of contracts, whether essential or relative, are not met, the contract will be void.

1. The time and place of conclusion of the contract

The time and place of conclusion of the contract are two relative conditions for the conclusion of the contract, subject to the provisions of art. 1186 of the NCC. This text distinguishes the incidence of these two conditions as follows:

a) by the express acceptance of the offer by the offeree, the contract being thus concluded when the acceptance reaches the offeror. In this case, the contract is formed even if the offeror, for reasons that are not attributable to him/her, did not take notice that the acceptance has reached him/her;

b) by the tacit acceptance of the offer by the offeree, the contract being thus concluded at the time when the offeree performs an act or fact – according to the practices established between the parties, business usages or nature, which leaves no doubt about the manifestation of his/her willingness to accept the offer.

Also, the provisions of art. 106 of Law no. 71/2011 for the implementation of Law no. 287/2009 on the Civil Code establish that the provisions of art. 1186, par. (1) and art. 1193, par. (2) of the NCC, are not applicable to contracts where the contract offer was sent before the entry into force of the Civil Code.

The time of conclusion of the contract is particularly important as regards the existence of the capacity of the parties, the transfer of rights on an asset, the term of the extinctive prescription, and, especially, according to this time, the law applicable to the legal relationship is established. Also, as shown above, the time of conclusion of the contract is when the acceptance meets the offer; this moment is also influenced by the location of the offeror and the offeree. Therefore, for contracts concluded at distance, the time and place where the acceptance met the offer shall always be checked.

2. The offer to contract

In the NCC, the offer to contract is in a natural correlation with the parties' consent to contract. Pursuant to art. 1188, para. (2) of the NCC, "a proposal is an offer to contract if the contract contains sufficient information to form and express the offeror's intention to be bound in case of acceptance by its offeree". This article further stipulates, in the next paragraph, that the contents of the offer may come from the person who initiates the conclusion of the contract, who determines its content and, where appropriate, who proposes the last essential element of the contract. The provisions relating to the consent, as an essential element for the formation of the contract, also applicable to the memorandum of association, included in art. 1182-1203 of the NCC, are applied properly, even when the circumstances under which the contract is concluded do not allow the identification of the offer and of the acceptance.

According to art. 1189 of the NCC, the proposal to undetermined persons, even assuming that it would be accurate, does not have the legal value of an offer, but, depending on specific circumstances, it has the value of a request for an offer or intention to negotiate.

Exceptionally, however, the same text, in paragraph (2), establishes that the proposal to undetermined persons equals an offer if this results from the law, from usual practices or, undoubtedly, from circumstances.

The analogy of the legal provisions in force reveals that there are two types of offers:

a. the offer with a time limit. The provisions of art. 1191, para. (1) of the NCC stipulate that the offer with a time limit is irrevocable. This feature can be attributed to the offer even when it results from the agreement of the parties, the practices established between them during negotiations, the content of
the offer or practices”. We can rather easily notice some features of commercial and business law implemented in civil law rules, namely, providing legal value to the "practices settled" between the parties to the contract;

b. the offer without a time limit. In its turn, this offer can be subdivided into: the offer without a time limit addressed to an absent person (art. 1193) and the offer without a time limit addressed to a present person (art. 1194, NCC):

- the offer without a time limit addressed to an absent person, regulated by art. 1193 of the NCC, should be kept within a reasonable period, depending on circumstances, in order to allow the offeree to receive and analyze it and send the acceptance;

- the offer without a time limit addressed to a present person, according to art. 1194 of the NCC, has no effect unless accepted immediately. These rules also apply to the offer submitted by phone, fax, e-mail or by other modern means of distance communication.

The offer is considered null when it does not reach the offeror in due time, or when the offeree refuses it. In the event that the offeror dies or becomes incapable, the nullity of the irrevocable offer will intervene only if this is required by the nature of the business or by circumstances [art. 1195 para. (2), NCC].

We can also state that the offer to contract may be withdrawn or revoked.

The offer is deemed withdrawn, when, according to art. 1199 of the NCC, it reaches the offeree prior or concomitant with the offer or, if applicable, with the acceptance.

The offer is considered revoked from the moment it reaches the offeree, even if he/she does not take notice, due to reasons which are not attributable to him/her [art. 1200, para. (1) NCC].

Another situation where the offer may become irrevocable is represented by the option agreement, for the purposes of art. 1278 of the NCC.

In what concerns the option (preference) agreement, one party undertakes to currently and anticipatedly conclude the contract, and expresses its consent so that, at the date upon which the beneficiary opts for its conclusion, with the ipso jure manifestation of its agreement, the contract is considered concluded [3]. Moreover, the legislator stated that the manifestation of will, thus expressed, according to art. 1278 of the NCC, is a binding offer, which produces the effects referred to in art. 1191 of the NCC.

Regarding the legal nature of an "offer", established by the legislator, we have some misgivings, because the classic offer is a proposal to contract, whereby the offeror establishes the elements that can be taken into consideration for the conclusion of the contract; or, as far as it concerns the option agreement, these elements are predetermined by the parties which conclude the "agreement" and not just by the one which could be the "offeror".

Under the legal provisions, the option agreement would have a complex legal nature within which we can identify both the offer to contract and an agreement for the benefit of the other party, which, in our opinion, could become the creditor of the other (with a recognized right to opt for the conclusion of the contract). The content of the option agreement should be similar to the contract to be concluded and it should contain all the elements, so the contract is concluded by simply accepting the option by the beneficiary.

Therefore, the option agreement could become a particularly useful legal instrument in a pre-contractual stage; in this case even if the parties have not agreed upon an acceptance date, the legislator took care of this issue, stating that this element can be established by the court, by presidential ordinance, under paragraph (2), art. 1278 of the NCC. In our opinion, this period may be determined by the court and in compliance with art. 1415 of the NCC (judicial determination of the term).
Even if it does not have a legal definition, the promise to contract is also an agreement whereby all parties, or only some of them, mutually commit to conclude a contract in the future. The main provisions regarding this issue are stipulated by art. 1279 of the NCC. If the obligation to conclude (to do) is assumed only by one of the contracting parties, we are in the presence of a unilateral promise to contract and, if both parties oblige themselves to conclude that contract, we are in the presence of a bilateral (reciprocal) promise to contract.

In accordance with the text of art. 1279 of the NCC, a promise entails the promisor's obligation to conclude a contract in the future, so that, if the promisee decides to contract, the promisor will have to express his/her consent for the conclusion of the subsequent contract. As with the option agreement, the content of a promise should include all the terms of the promised contract, because, in their absence, the parties cannot perform the promise.

In case of breach of promise, the beneficiary will be entitled to damages under art. 1530 of the NCC. Also, the promisor's obligation will be enforceable (indirectly), in which case, the court, at the request of the party which has fulfilled its obligations, can supply for the consent of the other party and render a decision that stands for the contract. For this reason, we can qualify the promise as having the nature of a preliminary contract, which would form the basis of the future conclusion of any type of contract, even of a real one, unless prohibited by the law.

3. The acceptance to conclude a contract

Similarly to the offer to contract, the acceptance to conclude a contract is closely related to the offeree's consent because it is the manifestation of his/her will to conclude the contract proposed by the holder of the offer. According to art. 1196 of the NCC, accepting the offer may be accomplished by any act or fact of the offeree, wherefrom there undoubtedly results his/her agreement to the proposed and submitted offer. The provisions of art. 1186 of the NCC on the time and place of the conclusion of the contract will be applied accordingly.

First, we have to mention that, in principle, silence does not equal acceptance. This happens only in the cases determined ope legis, or when it arises from the agreement of the parties or from the usages or practices established by the parties.

Also, the provisions of art. 1197, para. (1) of the NCC, establish that the offeree's answer cannot be considered an acceptance when:
- it includes changes or additions that do not meet the offer received;
- does not comply with the form required by the offeror;
- reaches the offeror after the offer became void.

Paragraph (2) states that where the offer contains changes or additions, it will be regarded as a counteroffer from the offeree.

The late acceptance or the acceptance received late, under paragraph (1) of art. 1198 of the NCC, triggers effects only if the person who made the offer immediately notifies the acceptor about the conclusion of the contract. If acceptance has been made in time but reached the offeror after the deadline, for reasons beyond the acceptor's control, it will take effect even if the offeror does not notify him/her immediately, under paragraph (2) of the above mentioned article.

Communication of acceptance should be performed by appropriate means of communication, similar to those whereby the offer was sent, unless the law, the agreement or the practices established between the parties do not indicate otherwise [art. 1200, para. (2), NCC].

The acceptance and the offer to contract may be withdrawn if the withdrawal reaches the offeree before or concurrently with the offer, or, where appropriate, with the acceptance. Both the offer and the

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acceptance, on the one hand, and the revocation, on the other hand, shall take effect only when they reach the offeree, even if he/she does not take notice of them for reasons beyond his/her control.

The acceptance, under the NCC, does not have a separate legal nature, being treated as a unilateral act subject to communication within the meaning of art. 1.326.

The contract shall be considered concluded when acceptance reached the offeror, even if he/she does not take notice of it for reasons beyond his/her control. Also, as already noted, at the time and place of conclusion of the contract, the contract is considered concluded even when the offeree performs a conclusive act or fact, without informing the offeror, if, under the practices of the parties or under the nature of the business, the acceptance can be made in this way (art. 1186, NCC).

4. The form and content of the contract

In art. 1178 of the NCC, the principle of freedom of form is enunciated, i.e. the conclusion of the contract is done simply, by the agreement between the parties capable of contracting, unless the law requires a certain formality. Also, although, in this part of the study, we treat the form of the contract as a condition relative to the valid conclusion of a contract, in essence, this condition can be essential under par. (2), art. 1.179 of the NCC, which establishes that: "if the law provides for some form of contract, it should be respected, under the sanction provided by applicable legal provisions".

Equally, regarding the content of the contract, we may notice that, under art. 1272 of the NCC, the valid contract obliges not only to what it expressly provides for, but also to all the consequences entailed by the practices established between the parties, usages, law or equity, depending on the contract nature. Also, the usual terms in a contract shall be inhered, even if they are not stated expressly in its content.

Returning to the notion of the form of the contract, according to art. 1240 of the NCC, the will to contract can be expressed verbally or in writing. Therefore, the will can be expressed by conduct which, under the law, the agreement between the parties and the practices or usages established among them, leaves no doubt about the intention to produce the legal effects triggered by the conclusion of a contract [4]. As such, according to the current civil legislation, the manifestation of the will of the parties has legal effect without any special formalities. Thus, we mention only a few contracts in which the mere agreement of the parties can produce legal effects: the lease contract is considered concluded as soon as the parties have agreed upon the asset and the price (art. 1781, NCC); the mandate contract may be concluded in authenticated writing or under private signature or verbally (art. 2013, NCC); etc.

For a more accurate approach on the form of the contract, we considered particularly useful to present various forms of contracts required in order to produce the expected legal effects. Therefore, we emphasize several points of view concerning the three types of forms incident to different types of contracts. Although these forms are analyzed at the presentation of the legal act, we consider it useful to transpose their incidence in the case of contracts, as bi- or multilateral acts, but also due to the judicious way by which they are regulated under the new civil provisions. Thus, we will discuss the ad validitatem (ad solemnitatem) form, the ad probationem form and the form required for the opposability of third parties.

a. The form required ad validitatem (ad solemnity). The form required for the validity of the legal act is the essential condition which implies the formalities required by law, without which the act would not be valid.

The NCC provides for certain situations where the written form is a condition of validity, in which case even the written document under private signature is sufficient to satisfy the legal requirement; however, in some cases, the form of authentic writing is required.

Regarding the contract, para. (2) of article 1242 of the NCC provides that: "If the parties have agreed to conclude a contract in a certain form, which the law does not require, the contract is deemed
valid even if the form has not been respected. But this text is contrary to art. 1244 of the NCC, which highlights the fact that "the conventions that transfer or constitute real rights which shall be registered in the Land Registry should be completed by authentic writing, subject to the sanction of absolute nullity". This provision clearly reveals that the failure to comply with the form required, as an essential rule for the validity of a contract of sale of a property, for example, is sanctioned by absolute nullity.

b. The ad probationem form. It represents the condition imposed by law or by the parties, which consists in preparing a written document in order to ascertain the civil legal act which was validly concluded.

According to art. 1241 of the NCC, the written document can ascertain the conclusion of the contract, under private signature or authentic form, having the probative force provided by law (i.e. constituent of the contract or probative value). This condition is established, for example, for the transaction contract or for the voluntary deposit contract. The failure to comply with the form required ad probationem does not entail the nullity of the act, as happens in the case of the ad validitatem form, but it triggers the impossibility to ascertain the act with other evidence. The following examples of contracts concluded by complying with the probationem ad form can be enlightening: the commission contract [Art. 2044, para. (2), NCC]; the consignment contract (art. 2055 of the NCC); the deposit contract (art. 2104 of the NCC); the insurance contract [Art. 2200, para. (1) of the NCC]; etc;

c. The form required for the opposability of third parties. The form of the legal act required for the opposability of third parties is that condition necessary for the act to be opposable/enforceable to persons who did not participate in its conclusion, in order to protect their rights and interests. This is a requirement provided in order to protect third parties against the damaging effects of legal acts.

It can be ensured by publicity formalities, in particular by the registration or notes in the Land Registry, for the voluntary conveyance of property rights, or by the registration in the Electronic Archive of Security Interests in Movable Property, for bonds and other security interests in movable property.

Pursuant to art. 1244 of the NCC, referring to the form required for the registration in the Land, there is determined by the necessity to conclude, by an authentic written document, under the sanction of absolute nullity, the conventions which alienate or establish real rights that will be registered in the Land Registry. The failure to comply with the form of the legal act for the opposability of third parties is sanctioned by the unenforceability of the legal act, which triggers the possibility for the interested third party to ignore the act invoked by the parties against it.

Regarding the content of the contract, as already stated, the provisions of art. 1272 of the NCC establish its legal framework. The determination of the whole contract content, i.e. the main, secondary or accessory rights and obligations, is made in the absence of any express provision, in the order established by law, namely: the practices established between the parties, the usages within the meaning of Article 1, paragraph (6) of the NCC, the legal provisions incident by analogy, as provided in paragraph (2), Art. 1 of the NCC, and, if applicable, the equity.

Also, under paragraph (2) of the said substantial norm, the usual terms of a contract are inhered, even if not expressly stated. In this respect, we might mention the provisions of art. 779 of the NCC regarding the content of the fiduciary contract. This text provides imperatively and under the sanction of absolute nullity for the content of the fiduciary contract.

Final considerations
The fundamental aim of this study was to reveal important new regulations on civil contracts. Since the theory of contracts is very complex, within our paper, we have tried to present, as a novelty, several regulations concerning the relative conditions for the valid conclusion of a contract. As revealed by our approach, if these conditions are not met, the natural sanction that may arise is the nullity of the contract. We believe, however, that the new civil provisions grant the parties a quite generous contractual freedom, in order to enable them to prepare the conclusion of a contract.

Therefore, in our opinion, all these theoretical details, which we have tried to illustrate within our study, highlight the moderate formalism which dominates the steps required by the new provisions of substantive law, steps which precede the conclusion of a contract.

References

2. The New Civil Code was adopted by Law no. 287/2009, republished in the Official Gazette of Romania, Part I, no. 505, from 1 October 2011, and it was implemented by Law no. 71/2011, published in the Official Gazette of Romania, Part I, no. 409 from 10 June 2011. Brevitatis causa, it will be called NCC;